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FILED
051099 FEB 25 2006
OFFICE OF THE CLERK

No. 05-

IN THE

Supreme Court of the United States

OCTOBER TERM, 2005

GOKHAN UNAL

Petitioner,

v.

FERIDE ELA AKINCI-UNAL

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Due Process Clause allow a State's courts to exercise personal jurisdiction over a nonresident in property claims by his former spouse which arise from their separation in another country and which are filed years after they had jointly left the State while still married, simply because at one time they had lived there as a married couple?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Gokhan Unal ("petitioner") respectfully petitions for a writ of certiorari to review the judgment of the Massachusetts Appeals Court in this case.

OPINIONS BELOW

The order of the Supreme Judicial Court declining discretionary further appellate review [App., *infra* at 13a] is unreported, but is referenced in a table at 445 Mass. 1106, 838 N.E.2d 576 (2005). The opinion and judgment of the Massachusetts Appeals Court [*infra* at 1a] is reported at 64 Mass.App.Ct. 212, 832 N.E. 2d 1 (2005). The opinion and judgment of the Massachusetts Probate and Family Court [*infra* at 14a] is unreported.

JURISDICTION

The Massachusetts Appeals Court entered its judgment on August 8, 2005, deciding the federal question.

An application for discretionary further appellate review was filed on October 14, 2005, pursuant to an order allowing such filing by the Supreme Judicial Court. On November 30, 2005, that court issued an order declining to review the judgment. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) with respect to a judgment of the Massachusetts Appeals Court as to which the Supreme Judicial Court declined to exercise its power of review.

STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution, sec. 1, provides in pertinent part as follows:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law;...

M.G.L. c. 223A, § 3 provides in pertinent part as follows:

...A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's...

(g) maintaining a domicile in this commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim;...

STATEMENT OF THE CASE

Petitioner seeks review by this Court because the Massachusetts Appeals Court has held that Massachusetts may assert jurisdiction over him in property claims brought by his former wife several years after they left Massachusetts together in 1994 while still married. The Massachusetts court has ruled that the Fourteenth Amendment's Due Process Clause is satisfied solely because the parties lived at one time in Massachusetts as a married couple. As it did in *Kulko v. Superior Court of California*, 436 U.S. 84 (1978), *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), this Court should exercise jurisdiction over the Appeals Court's decision that petitioner must litigate these claims in a Massachusetts court.

A. *Facts*

Petitioner and respondent Feride Ela Akinci-Unal ("respondent") were married in Turkey, their homeland, in December, 1987. In 1988, the couple moved to Massachusetts so that petitioner could attend business school and become employed in the financial services industry. They were married in a civil ceremony in Massachusetts in February, 1988. Subsequently, respondent returned to Turkey on four separate occasions for extended periods, although the parties remained married [*infra* at 2a-3a]. In 1994, petitioner moved to Bahrain, where he had been transferred by his employer, and took up permanent residence. Respondent joined him in Bahrain in 1994. The marriage was childless and there is no evidence of any marital real estate in Massachusetts [*Id.*]. As the Probate and Family Court found, the couple lived together in Bahrain sporadically, with respondent returning to her family in Turkey on occasions when petitioner was on business trips, but respondent left Bahrain permanently in October, 1996 [*infra* at 14a-15a]. Although respondent was unclear about where she was

domiciled after 1996, she admitted that she "'went back to Turkey first and ... eventually went back to the United States'" [*infra* at 3a n. 1]. Petitioner provided undisputed evidence that she was residing in Turkey until July, 1997, when he commenced divorce proceedings there, and that respondent then moved to the United States [*Id.*].[1] In response to petitioner's divorce filing in Turkey, respondent brought an action for separate support in the Massachusetts Probate and Family Court in October, 1997 [*infra* at 3a].[2] Petitioner commenced a second divorce action, this time in Bahrain, and obtained a divorce in March, 1998. The Bahrainian judgment expressly preserved respondent's rights arising from the divorce [*infra* at 3a-4a]. Because the parties no longer were married, the Massachusetts court dismissed respondent's action for separate support in July, 1999 [*infra* at 4a].

On September 22, 1999, respondent filed the action in the Massachusetts court for alimony and property division which is the subject of this petition [*infra* at 15a]. Meanwhile, petitioner's action in Turkey went forward. Respondent was represented by counsel and the Turkish court granted a divorce in June, 2000, again explicitly preserving respondent's rights to compensation or maintenance [*infra* at 4a]. Unable to serve petitioner in Massachusetts, respondent finally obtained leave from the Massachusetts court for alternative service in November, 2002 [*Id.*].

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[1] The Appeals Court ruled that respondent had the burden of "establishing facts sufficient to justify [the] exercise" of jurisdiction [*infra* at 5a]. To the extent it was relevant, she failed to pin down exactly when she returned to Massachusetts. Petitioner's evidence on this point, as noted, was not refuted.

[2] Respondent served petitioner personally when he visited Massachusetts in January, 1998 to meet with his employer [*infra* at 3a n. 2].

B. *Course of Proceedings*

In the Probate and Family Court, petitioner filed a timely special appearance and a motion to dismiss which asserted defenses, including that the exercise of personal jurisdiction by the court under the relevant provision of the Massachusetts Long Arm Statute, M.G.L. c. 223A, § 3(g), would violate his Fourteenth Amendment due process right because he lacks the requisite "minimum contacts" with Massachusetts as required under *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) [State App. 48-61][3]. After a hearing, the Massachusetts court issued an order allowing petitioner's motion and dismissing respondent's action in June, 2003. The court relied on several grounds. Pertinent here, it concluded that § 3(g) does not confer jurisdiction because respondent's claim relies on no conduct by petitioner which occurred while they lived in Massachusetts and because, in any event, the exercise of personal jurisdiction would offend the basic requirements of due process set forth in *International Shoe Co. v. Washington*, 326 U.S. at 319-20 [*infra* at 20a-22a]. Respondent appealed.

On appeal, the Massachusetts Appeals Court reversed and held that respondent's claims against petitioner can go forward in the Massachusetts Court. It applied the two-step analysis mandated by *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 5-6, 389 N.E.2d 76, 79 (1979), which holds that the Long Arm Statute is "'an assertion of jurisdiction to the limits allowed by the Constitution...'" [citation omitted]. The court therefore inquired, first, whether § 3(g) of the Long Arm Statute authorizes jurisdiction and, if so, whether the exercise of jurisdiction is "'consistent with basic due process requirements mandated by

[3] The defense was raised under Mass.R.Dom.Rel.P. 12(b)(2), which is identical to Mass.R.Civ.P. 12(b)(2).

the United States Constitution'" [*infra* at 5a].[4] The court concluded that § 3(g) does indeed confer jurisdiction over petitioner because "it is the marital relationship in Massachusetts from 1988 to 1994 that has given rise to [respondent's] economic claims" rather than the subsequent dissolution of the marriage outside Massachusetts [*infra* at 6a]. The court then held that the exercise of jurisdiction also comports with petitioner's federal due process right. Finding that "the 'heft' of the marriage was located" in Massachusetts and that the parties lived there in marriage "for close to six years", the Appeals Court ruled that petitioner could "scarcely be surprised by, nor reasonably view as unfair", the enforcement by Massachusetts of rights "that arise from that relationship" [*infra* at 7a] [quoting *Rutledge v. Rutledge*, 26 Mass.App.Ct. 537, 529 N.E.2d 1361, 1363 (1988)]. Observing that the Long Arm Statute no longer requires that the parties' marital residence in Massachusetts "be recent", the court concluded that the Massachusetts court's "power to adjudicate ... arose as the result of a marriage with a duration principally in Massachusetts" and that this authority was not lost "merely because the parties attempted to preserve the marriage in Bahrain, then separated permanently when the marriage disintegrated." [*infra* at 7a-8a].[5]

Petitioner filed an application for discretionary further appellate review in the Supreme Judicial Court pursuant to Mass.R.App.Pro. 27.1 which, *inter alia*, challenged the Appeals Court's ruling on the due process question, but the

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[4] The court found no other basis for personal jurisdiction, and specifically rejected respondent's assertion of the separate "transacting business" provision in the Long Arm Statute, § 3(a) [*infra* at 6a n.6].

[5] The court also rejected petitioner's separate arguments that it should defer to the foreign courts on grounds of claim preclusion and comity [*infra* at 8a-11a].

application was denied without opinion [*infra* at 24a-26a, 13a].[6]

REASONS FOR GRANTING THE PETITION

This Court has yet to decide whether a State's assertion of personal jurisdiction over a nonresident for property claims arising from a divorce is constitutional even though the parties left that State years earlier while still married. Bedrock principles of this Court's decisions in other cases applying the Due Process clause's "minimum contact" test show that the Appeals Court's decision directly conflicts with those principles. Moreover, this important federal right is the subject of differing interpretations by state courts which have decided the question, and its parameters should be settled conclusively by this Court.

This Court long ago recognized that while the marital status of a nonresident may be determined by the State where the other party merely is domiciled, its courts must have personal jurisdiction over the nonresident to resolve questions of property. In other words, the divorce is "divisible" with respect to dissolution and to property division, alimony and support. *Estin v. Estin,* 334 US 541, 549 (1948). In *Kulko v. Superior Court of California,* 436 US at 92-102, this Court made clear that personal jurisdiction over property questions in divorce cases is measured by the now-familiar "minimum contacts" test under the Fourteenth Amendment's Due Process Clause, originally articulated in *International Shoe Co. v. Washington*, 326 U.S. at 316, 319-20 (1945).

Kulko held that a California court's exercise of jurisdiction over the nonresident husband in a suit to increase child support payments violated due process. In *Kulko,* the parties had married during a brief stay in California and then

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[6] Only that portion of the application challenging the Appeals Court's due process ruling is included in the Appendix *infra* at 24 a-26a.

lived in New York, where the two children were born. When the parties separated, the wife moved to California and, under the parties' separation agreement, the children spent vacations with her there. Ultimately, one child joined the wife in California with the husband's assistance and, later, the second also moved to California. This Court held that the California court's failure to quash service was invalid, despite the parties' brief stay in California to be married, the husband's payments of child support into California, his cooperation in sending the children to California for visits, and his role ultimately in allowing them to move there. *Kulko v. Superior Court*, 436 U.S. at 91-101. *Kulko* ruled that none of these facts, alone or in combination, rendered it "'reasonable' and 'fair' to require him to conduct his defense" in California, observing that he had not "purposefully derived benefit from any activities relating to" California. *Id.* at 92, 96 [citing *International Shoe Co. v. Washington*, 326 U.S. at 316-17, 319]. *Kulko* further held that the wife's claim involved the husband's "personal, domestic relations" rather than his "commercial transactions in interstate commerce" and that "basic considerations of fairness" barred the exercise of jurisdiction where it was the wife's "'unilateral'" act of leaving the marital domicile in New York for California which was responsible for the husband's meaningful contacts with that State. *Kulko v. Superior Court*, 436 U.S. at 97, 93.

I. Massachusetts' Exercise Of Judicial Power Over Petitioner In Property Claims Filed Several Years After The Parties Jointly Departed The State While Still Married Violates The Core Principles Consistently Invoked By This Court In Its "Minimum Contacts" Test.

The *Kulko* Court was not called upon to decide a case such as petitioner presents, where the parties resided as a married couple for a substantial period of time in the State which now asserts jurisdiction years after they left the State together. But the core principles relied on in *Kulko* demon-

strate why the Massachusetts court's exercise of jurisdiction in this action for alimony and property division violates due process just as much as did the California court's action in *Kulko*.

Although the parties lived in Massachusetts for six years while married, both left Massachusetts in 1994 and, therefore, so did their marriage.[7] The parties took up residence in Bahrain, where their marriage ultimately fell apart. During that time, and for a period thereafter, respondent was located in her native country of Turkey when not living with petitioner. When the parties departed Massachusetts in 1994, they left no tangible marital property behind. Some three years after leaving, and in conjunction with the filing of a divorce action in Turkey by petitioner, respondent unilaterally returned to Massachusetts. That State obtained jurisdiction over property division and alimony in an action filed some five years after the couple had left solely because, in the Appeals Court's view, the "'heft' of the marriage" had once been "located" in Massachusetts and petitioner's obligations arose "as the result of a marriage with a duration principally" there [*infra* at 7a-8a] [emphasis added]. This ruling offends several cardinal principles which this Court repeatedly has used when applying the "minimum contacts" standard.

First, in *Kulko* this Court focused on "basic considerations of fairness" *Kulko v. Superior Court*, 436 U.S. at 97. The Court found "no basis on which it can be said that [the non-resident husband] could reasonably have anticipated being 'haled before a California court'" and concluded that he had done nothing that he could reasonably "expect to result in the substantial financial burden and personal strain of litigating a child support suit in a forum 3,000 miles away." *Id.* at 97-98 [quoting *Shaffer v. Heitner*, 433 US

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[7] Respondent did return to Turkey on four different occasions during this period [*infra* at 3a].

186, 216 (1977)]. *Kulko* invoked a principle which lies at the heart of due process analysis in the "minimum contacts" test. *See Burger King Corp. v. Rudzewicz,* 471 US 462, 474 (1985) [quoting *World-Wide Volkswagen Corp. v. Woodson,* 444 US 286, 297 (1980)]. The Appeals Court, however, decided in perfunctory fashion that petitioner "can scarcely be surprised by ... this State's enforcement of [respondent's] rights ... that arise from [the marital] relationship" [*infra* at 7a]. This simply ignores the facts and human experience.

Once the parties jointly departed Massachusetts with the marriage, petitioner had no reason to believe that economic claims arising if the marriage subsequently broke up elsewhere would be resolved by the forum they had willingly left together, in actions filed several years later. In the meantime, he reasonably could make decisions about the manner and method of acquiring and holding various types of property based on laws and customs of the parties' new marital residence.

Had petitioner left on his own and respondent stayed in Massachusetts, the exercise of personal jurisdiction might comply with the "minimum contacts" test. In that event, one party to the marriage would have stayed in Massachusetts; Massachusetts would be the place where the event occurred which gave rise to respondent's property claims – the breakup of the marriage; and, finally, Massachusetts would likely be the location of any marital real estate. In those circumstances, the basic considerations of fairness and the nonresident's reasonable expectations which this Court always has looked to might warrant the exercise of jurisdiction, because petitioner arguably could foresee that a Massachusetts court would determine respondent's property claims. In fact, until 1994 the relevant section of the Massachusetts Long Arm Statute reflected these principles and may well have satisfied the "minimum contacts" stan-

dard. It also would have barred respondent's action by its terms.

The prior version of § 3(g) provided for personal jurisdiction over a non-resident if "the marital domicile of both parties" was located in Massachusetts "for at least one year within the two years immediately preceding the commencement of the action" *and* "if the plaintiff *continues* to reside within" Massachusetts [emphasis added]. On its face, this provision would have required dismissal of respondent's action. Its implicit requirement that Massachusetts be the locus of the marital breakup, its mandate that respondent have remained in Massachusetts, and, most important, its clear prerequisite that the couple have been resident in Massachusetts while married for at least one year within the two years preceding the filing of respondent's claims, would have amounted to a prescription that the nonresident have continuing relevant contacts.[8]

The current version of § 3(g) was added through amendment by St. 1993, c. 460, § 86, which was approved on January 13, 1994. As a consequence of that change and subsequent judicial construction, Massachusetts now requires petitioner to defend property claims in a court halfway across the world from where he lives, several years after he departed Massachusetts with respondent. Even in the commercial context, this Court has examined with particularly exacting scrutiny the assertion by a State of jurisdiction over a foreign defendant, giving "significant weight" to the "unique burdens" imposed on "one who must defend himself in a foreign legal system" and counseling "'[g]reat care and reserve ... when extending our notions of personal jurisdiction into the international field.'" *Asahi Metal Industry Co., Ltd. v. Superior Court,* 480 US at 114, 115 [quoting *United States v. First Nat'l*

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[8] The Appeals Court explicitly noted that the prior version of § 3(g) required that the "marital residence in Massachusetts be recent" [*infra* at 7a].

City Bank, 379 US 378, 404 *(*1965*)* (Harlan, J., dissenting)]. Yet greater restraint should be exercised where the defendant is an individual and the claim involves his "personal, domestic relations" rather than his conduct seeking "a commercial benefit". *Kulko v. Superior Court*, 436 U.S. at 97. The Appeals Court's formulation of the due process standard wrongly eschews these factors.

Moreover, in *Kulko* this Court gave significant weight to its oft-stated rule that "'[t]he unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State ....'" *Kulko v. Superior Court*, 436 U.S. at 93-94 [quoting *Hanson v. Denckla,* 357 US 235, 253 (1958)]. *See also Helicopteros Nacionales de Colombia, S.A. v. Hall,* 466 US 408, 417 (1984). Here, however, petitioner's only act which is remotely connected to the breakup of his marriage and its consequences was living in Massachusetts for a period of time in the past *while* still married.[9] The parties left Massachusetts together in 1994, taking the marriage with them.[10] The marriage ended some years later in another country. The Massachusetts court now exercises jurisdiction only because respondent unilaterally decided to return to Massachusetts three years after leaving, for the purpose of pursuing litigation over alimony and property division which she filed five years following the departure. She has, in effect, "rekindled" petitioner's contact with Massachusetts by her arbitrary act. Nothing in this Court's prior decisions remotely authorizes any such theory.

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[9] It bears repeating that the cause of action "arises, not from [petitioner's] commercial transactions in interstate commerce, but rather from his personal, domestic relations". *Kulko v. Superior Court*, 436 U.S. at 97.

[10] The Appeals Court's point that petitioner "does not defeat [Massachusetts'] power to act merely by leaving the jurisdiction" simply ignores the undisputed fact that *both* parties jointly and voluntarily left in 1994 while still married [*infra* at 7a].

Finally, the Appeals Court's ruling that the respondent's economic claims arise from "the marital relationship" and not from its dissolution is a fiction which is directly at odds with the common sense analysis in *Kulko*. There, this Court cogently observed that the "controversy" involving the wife's claim for increased child support "arises from a separation that occurred in the State of New York" *i.e.*, not merely from a "marital relationship" that once was centered there. *Kulko v. Superior Court*, 436 U.S. at 97. Put differently, respondent had no property claims until the marriage fell apart in Bahrain and she moved to Turkey. As in *Kulko,* respondent's claims here for alimony and property division arise from a separation that occurred outside the forum state after the parties moved.

The Appeals Court's holding eviscerates the "minimum contacts" test developed by this Court. It relies on petitioner's domestic relations "contacts, ties or relations" with Massachusetts which once existed but which were severed several years ago by the parties' joint, voluntary act. *Compare International Shoe Co. v. Washington*, 326 U.S. at 319. *Id.* Ironically, the nonresident husband in *Kulko* had more self-initiated contacts with California resulting from the dissolution of his marriage than petitioner currently has with Massachusetts. "More" was nevertheless not enough to satisfy due process in *Kulko*. The Massachusetts courts therefore have decided an important question of federal law in a way that conflicts with the foundational rules in relevant decisions by this Court and review should be granted.

II. The State Courts Are In Disagreement Over An Important Federal Question. They Have Reached Conflicting Answers About Whether The Due Process Clause Allows A State To Exercise Personal Jurisdiction Over a Nonresident In Property Claims Filed Years After The Parties Jointly Departed The State While Still Married.

This Court's review is warranted for another reason. The Massachusetts Appeals Court's application of the "minimum contacts" test under the Due Process Clause conflicts with the interpretation of that test by courts in other states, which in turn have developed varying formulations of the test. An important right under the Constitution should not be interpreted under principles which differ merely because a person who claims its protection has crossed a border from one State into another.

A Florida court clearly would rule that the assertion of its power over petitioner on identical facts violates due process. In *Garrett v. Garrett,* 668 So.2d 991 (Fla. 1996), which involved property claims against a nonresident by his former wife, the parties had been married in Florida and lived there for twelve years before jointly moving to Texas. They lived in that State for five years, where they ultimately separated. The wife then returned to Florida with the couple's child and still resided there when she brought the action. *Id.* at 992. The facts showed that the nonresident husband periodically returned to Florida to visit the child and made regular business trips there. *Id.* The Florida court rejected these contacts as a basis for personal jurisdiction. The court first noted that the reach of Florida's Long Arm Statute "is limited by the Due Process Clause" and cited several decisions by this Court in support. *Id.* at 993-94 & n.2 [citations omitted]. The Florida court then ruled that when the parties jointly left Florida they "effectively abandoned this state". *Id.* at 994. It therefore concluded that the Florida Long Arm Statute, § 48.193, Fla.

Stat. (1993), did not reach the nonresident husband because otherwise the exercise of jurisdiction based on his prior residence there while married "would clearly violate the Due Process Clause ...". *Id.*

A New Jersey court has reached a similar result. In *Katz v. Katz,* 310 N.J.Super. 25, 707 A.2d 1353 (A.D. 1998), the court decided a case asserting a claim by the former wife for reimbursement of a custodial account. The parties had been married in New Jersey but promptly moved to South Carolina and then Florida, where the child was born. They returned to New Jersey, where they lived for six years before moving to Pennsylvania for another seven. There, they separated and were divorced, following which the wife and child returned to New Jersey. The husband remained a nonresident, although he became employed by a company headquartered in New Jersey, continued as a limited partner in an entity which owned two buildings there, and maintained his registration as a New Jersey attorney. *Id.*, 310 N.J.Super. at 27-29, 707 A.2d at 1354-55. The court observed that New Jersey's personal jurisdiction over a nonresident is wielded "'to the extent consistent with due process of law'" and reviewed the principles established by this Court in its several decisions. *Id.* 310 N.J.Super. at 30-32, 707 A.2d at 1355-56 [citations omitted]. Noting that the parties had "freely moved their marital domicile to Pennsylvania and concluded their marital and familial obligations to each other there", the *Katz* court held that "[w]hatever ties [the nonresident husband] may have had with this State have evaporated over the years and New Jersey's power to exercise personal jurisdiction ... has similarly disappeared." *Id.* 310 N.J.Super. at 32, 707 A.2d at 1356. As the *Garrett* court would rule in Florida, the *Katz* court would necessarily find that New Jersey could not exercise jurisdiction over respondent's claims on the facts of this case.

Two New York courts appear to have reached somewhat conflicting results. In *Klette v. Klette,* 167 A.D.2d 197, 197-98, 561 N.Y.S.2d 580, 581-82 (1st Dept 1990), the court held that the assertion of jurisdiction over a nonresident in an action to modify a Connecticut judgment and separation agreement would "violate due process principles". The parties had lived seven years in New York and eight years in Connecticut, where they separated and were divorced and from where the wife returned to New York. *Id.* The court found that jurisdiction would offend due process even though the nonresident husband had assisted the wife in her move back to New York and regularly visited the children and their schools and therapists in that State. *Id.* On the other hand, in *Levy v. Levy,* 185 A.D.2d 15, 16-18, 592 N.Y.S.2d 480, 481-82 (3rd Dept), *app. dism.* 82 N.Y.2d 707, 619 N.E.2d 665, 601 N.Y.2d 587 (1993) the court held that similar facts in a "matrimonial action" showed ties "greater than the more attenuated contacts found in *Kulko* [*v. Superior Court*, 436 U.S. at 91-101]" and that the requirements of *International Shoe Co. v. Washington*, 326 U.S. at 316, 319-20, "were not offended". *Cf. DePaulitte v. DePaulitte,* 138 Ohio App.3d 780, 784, 742 N.E.2d 659, 662 (2000), *app. dism.* 91 Ohio St.3d 1201, 740 N.E.2d 1103 (2001) suggesting that in Ohio the federal "minimum contacts" test requires factors such as the continuing Ohio location of the parties' assets, the wife's maintenance of her Ohio residence following separation, and the occurrence in Ohio of the grounds for divorce [citing and construing *Fraiberg v. Cuyahoga Cty. Court of Common Pleas,* 76 Ohio St.3d 374, 378, 667 N.E.2d 1189, 1193 (1996)].

Finally, the commentators to the Uniform Interstate Family Support Act have indicated that the Appeals Court's ruling would be wrong in the context of a child support or-

der.[11] The Comment presents two hypotheticals, in each of which two parents and their child "lived in State A for many years, and then decided to move the family to State B to seek better employment opportunities." *Id.*, 9 U.L.A. 186 (2001). In the first hypothetical, the opportunities failed to materialize and, "after several weeks or a few months of frustration with the situation, one of the parents returned with the child to State A." *Id.* The Comment indicates that long arm jurisdiction to establish the nonresident's support obligation in that case may be proper. *Id.* In contrast, the second hypothetical "suppose[s] that the family's sojourn in State B lasted for many years and then one parent unilaterally decides to return to State A." *Id.*, 9 U.L.A. at 186-87. The Comment concludes "[i]t is a reasonable expectation that all tribunals will conclude that assertion of personal jurisdiction over the absent parent immediately after the return ... would offend due process." *Id.*, 9 U.L.A. at 187.

The Appeals Court's decision is in clear conflict with the express rationales and results of at least some of the foregoing authorities. The Due Process Clause and its "minimum contacts" test therefore are applied differently in different states. The contours of a significant Constitutional right, however, cannot vary simply because property claims are brought in the courts of one State rather than in those of another. Moreover, the state courts are struggling with a uniform or precise formulation of the "minimum contacts" test as it applies to domestic relations cases where the parties left the forum while married and one party later returns to unilaterally invoke jurisdiction. This important question of federal law should not remain unsettled in a so-

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[11] Obviously, any specific arguments which might affect due process concerns with regard to child support orders are irrelevant to this case. This Court, however, refused to modify the test in *Kulko v. Superior Court*, 436 U.S. at 100-01.

ciety where families are inherently mobile and may move two, three, or more times in the course of a marriage.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 28, 2006

APPENDIX A

Appeals Court of Massachusetts

FERIDE ELA AKINCI-UNAL *vs.* GOKHAN UNAL.

No. 03-P-1629.

Suffolk. November 8, 2004. - August 8, 2005.

Present: GREENBERG, COWIN, & DOERFER, JJ.

Divorce and Separation, Division of property, Alimony, Judgment, Foreign judgment. *Statute,* Construction. *Due Process of Law,* Jurisdiction over nonresident. *Jurisdiction,* Nonresident, Long-arm statute, Probate Court. *Probate Court,* Jurisdiction. *Res Judicata. Judgment,* Preclusive effect. *Comity.*

In the circumstances of an action brought by a former wife in Probate and Family Court, seeking alimony and an equitable distribution of assets from the nonresident former husband, both the Massachusetts long-arm statute, G. L. c. 223A, § 3, and due process considerations permitted the assertion of personal jurisdiction over the husband, who had maintained a domicile in the Commonwealth for the principal duration of the marital relationship, out of which the wife's economic claims arose. [215-218]

Principles of claim preclusion [218-220] and comity [220-221] did not bar a former wife's postdivorce complaint for alimony and equitable distribution of assets under G. L. c. 208, § 34, where the previous divorce proceedings in two foreign courts did not determine the wife's claims for economic relief.

COMPLAINT for support filed in the Suffolk Division of the Probate and Family Court Department on October 8, 1997.

A motion to dismiss was heard by *Nancy M. Gould,* J.

Linda A. Ouellette for the plaintiff.

Douglas S. Segal (Ailsa DePrada Deitemeyer with him) for the defendant.

COWIN, J. The plaintiff, Feride Ela Akinci-Unal (the wife), appeals from a judgment entered by order of a judge of the Probate and Family Court dismissing her complaint for equitable distribution of assets and alimony, see G. L. c.208, § 34. The dismissal followed, and was based on, the obtaining by the defendant, Gokhan Unal (the husband), of divorces pursuant to judgments entered in the countries of Bahrain and Turkey. In light of those foreign judgments of divorce, and on consideration of the parties' affidavits, the judge terminated the wife's proceeding in Massachusetts, concluding that the doctrine of comity required that the foreign judgments receive recognition; that the wife's action was barred by principles of res judicata; and that the court could not exert jurisdiction over the person of the husband in any event.

We conclude that the Massachusetts courts may permissibly exercise jurisdiction over the person of the husband. With respect to the husband's defense based on principles of res judicata, specifically claim preclusion, we hold that the wife's post-divorce complaint under G. L. c. 208, § 34, is not barred because there has been no previous determination with respect to her economic claims. That being the case, the doctrine of comity is inapplicable. Accordingly, we reverse and remand for further proceedings in the trial court.

While, not surprisingly, the parties' affidavits differ in their characterizations of the marriage and their assignments of fault with respect to its failure, material facts sufficient to determine the viability of the wife's complaint appear genuinely undisputed. The parties were married in a religious ceremony in Turkey, their homeland, on December 19, 1987. The marriage produced no children. The couple moved to Massachusetts shortly thereafter so that the husband could attend business school and take a posi-

tion in the financial services industry. They were married in a civil ceremony in Massachusetts on February 1, 1988. The couple lived together as husband and wife in Massachusetts for close to six years, although the wife left Massachusetts on four separate occasions to return to Turkey for extended periods. In late 1994, the husband left Massachusetts himself and took up permanent residence in Bahrain where he continued to work for the same company that had employed him in Massachusetts. The couple lived together in Bahrain sporadically over the next two years. The wife left Bahrain permanently in October, 1996, returning only briefly in June, 1997, when she collected her belongings.[1]

In July, 1997, the husband commenced divorce proceedings in Turkey. The wife followed in October, 1997, by filing a complaint for separate support in the Massachusetts Probate and Family Court.[2] The husband then initiated a second action for divorce in Bahrain, obtaining a judgment of divorce from the Bahrainian tribunal on March 14, 1998. Although that judgment recites that the wife "was duly served by registered post," the wife asserts that she received no notice of the commencement of the proceeding. In any event, she did not participate. Besides dissolving the marriage, the judgment ordered the husband to repay the wife's dowry and further provided that the deci-

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[1] It is unclear from the existing record where the wife has been domiciled from 1996 forward. In an affidavit, she states that upon finally separating from the husband, she "went back to Turkey first and. . . eventually went back to the United States." She states in addition: "I had no choice but to try to make it on my own in Massachusetts. I struggled to obtain employment and an apartment. I lived temporarily with a friend until I could get my own place." In his affidavit, the husband refers to the wife as living in Turkey when he commenced divorce proceedings there. He then states that "[a]s soon as she learned that I had filed for divorce, she left Turkey for the United States. "

[2] The wife effected service *of* process on the husband when he subsequently came to Massachusetts to meet with his employer.

sion was "without prejudice to the rights of the [wife] arising from the divorce, if any." The Massachusetts judge thereafter dismissed the wife's complaint for separate support on the ground that the parties were no longer married.[3] This precipitated the filing by the wife of the complaint for alimony and equitable distribution of assets, see G. L. c. 208, § 34, that is the subject of the present appeal.

The husband's divorce proceeding in Turkey also went forward, with the wife this time represented by counsel. On June 1, 2000, the Turkish court granted the husband a divorce, reserving, as had the Bahrainian court, any questions regarding the wife's rights to compensation or maintenance.[4] The wife eventually obtained leave for alternative service on the husband of her complaint under G. L. c. 208, § 34.[5] The husband responded with a motion to dismiss, citing Mass.R.Civ.P. 12(b)(1), (2), (4), (5), and (6), 365 Mass. 755 (1974). The motion was allowed after a hearing, and the wife filed a timely notice of appeal.

1. *Jurisdiction over the husband.* We address the question of personal jurisdiction first because other issues are obviously moot if the court is without power to adjudicate at all. General Laws c. 208, § 34, as amended through St. 1982, c. 642, § 1, authorizes the award of alimony or the allocation of marital property "[u]pon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction . . . , provided there is personal jurisdiction over both parties." Accordingly, to

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[3] The wife did not appeal from that judgment of dismissal.

[4] The Turkish decree provided specifically that "the Respondent's further right of claim for compensation of pecuniary loss and mental anguish is duly reserved."

[5] The wife had earlier sought and received several extensions of the time in which to make service, but was apparently unable to do so by conventional means.

determine whether the wife's claims may lawfully be adjudicated in Massachusetts, we apply the two-step inquiry set forth in *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. 1, 5-6 (1979): specifically, whether the assertion of jurisdiction over the nonresident defendant (in this case, the husband) is authorized by statute; and if so, whether such "exercise of jurisdiction under State law [is] consistent with basic due process requirements mandated by the United States Constitution." *See Windsor v. Windsor*, 45 Mass. App. Ct. 650, 652 (1998). Because the husband has challenged the assertion of in personam jurisdiction, the wife has the burden of establishing facts sufficient to justify its exercise. *See Good Hope Indus., Inc., supra* at 3.

We conclude that the wife is entitled to seek relief in Massachusetts pursuant to the long-arm statute, specifically, G. L. c.223A, § 3, as amended by St. 1993, c. 460, § 86, which provides, in pertinent part: "A court may exercise personal jurisdiction over a person. . . as to a cause of action in law or equity arising from the person's. . . (g) maintaining a domicile in this commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim." The statute is intended to confer jurisdiction over the person to the limits allowed by the United States Constitution. See *"Automatic" Sprinkler Corp. of America v. Seneca Foods Corp.*, 361 Mass. 441,443 (1972).

Whether jurisdiction may permissibly be asserted under the long-arm statute is dependent on the particular facts of the case. *See Morrill v. Tong*, 390 Mass. 120, 129 (1983). Here, the couple married in Massachusetts and lived in the Commonwealth from early 1988 to late 1994. While the wife absented herself frequently, it seems clear that the marital home during that period was in the Commonwealth. As a result, the provisions of G. L. c. 223A, § 3(g), are im-

plicated. The husband "maintain[ed] a domicile in this commonwealth while a party to a personal or marital relationship." *Ibid.* Claims by the wife for alimony and a property allocation have arisen out of the marital relationship. We reject the contention that no claim exists because the husband has not lived in Massachusetts since 1994. The claims for alimony and assignment of marital assets arise out of the existence of the marriage; while such claims may be triggered by the marriage's dissolution, the wife's rights are not a product of that dissolution, but rather of the preceding marital status.

Caffyn v. Caffyn, 441 Mass. 487 (2004), and *Windsor v. Windsor, supra*, are not to the contrary. Those cases involve whether grounds for dissolution of the marriage occurred in Massachusetts. In *Caffyn*, 441 Mass. at 496, the court considered whether an alleged "irretrievable breakdown" took place in the Commonwealth. In *Windsor*, a wife filed a complaint in 1995 in Massachusetts seeking a divorce on the grounds of irretrievable breakdown of the marriage and cruel and abusive treatment. The couple lived in Massachusetts from 1959 to 1966, then took up residence in Florida, where they separated in 1977. We observed that the complaint alleged no conduct by the husband during the 1959-1966 period of Massachusetts domicile that established a ground for divorce. *Windsor*, 45 Mass. App. Ct. at 654. Thus no claim arose within the period during which the married couple were domiciled here. By contrast, in the present case, grounds for divorce are not disputed. Rather, it is the marital relationship in Massachusetts from 1988 to 1994 that has given rise to the wife's economic claims, and that thus places those claims squarely within the scope of G. L. c. 223A, § 3(g).[6]

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[6] Because we conclude that G. L. c. 223A, § 3(g), authorizes the exercise of jurisdiction over the husband's person in this case, we need not address other grounds proffered by the wife. See G. L. c. 223A, § 3(a). We note, however, that the fact that the husband transacted business in

Having determined that jurisdiction over the husband is predicated properly on G. L. c. 223A, § 3(g), we turn to the question whether that section, so applied, offends Federal due process requirements. See *Good Hope Indus., Inc. v. Ryder Scott Co.*, 378 Mass. at 5-6. Due process in this context requires that there be at least a minimum level of contact between the nonresident defendant and the forum State that reflects that the defendant has purposefully conducted activities within that State, "thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). See *International Shoe Co. v. Washington*, 326 U.S. 310, 316-317 (1945).

It is fair to say that the "heft" of the marriage was located here. See *Rutledge v. Rutledge*, 26 Mass. App. Ct. 537, 539 (1988); *Anderson v. Anderson*, 39 Mass. App. Ct. 907, 908 (1995). The husband chose to come to Massachusetts, married here in a civil ceremony, and lived here in a marriage for close to six years. Having voluntarily engaged in a relationship that has legal consequences, the husband can scarcely be surprised by, nor reasonably view as unfair, this State's enforcement of the wife's rights (if any) that arise from that relationship. Certainly he does not defeat the Commonwealth's power to act merely by leaving the jurisdiction; such circumstances are among the reasons that long-arm statutes exist.

Nor are we persuaded that a jurisdictional defense emerges because the wife lived with the husband for periods of time in Bahrain between 1994 and 1996. Since the revision of G. L. c. 223A, § 3(g), in 1993, there has been no requirement under this part of the long-arm statute that the parties' marital residence in Massachusetts be recent.[7] The

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the Commonwealth is of little help to the wife because her claims do not arise from such transactions. Contrast *Johnson v. Witkowski*, 30 Mass. App. Ct. 697, 713 (1991).

[7] The original version of G. L. c. 223A, § 3(g), inserted by St. 1976, c.435, required that the parties' marital domicile be in Massachusetts

Commonwealth's power to adjudicate with respect to the husband's obligations arose as the result of a marriage with a duration principally in Massachusetts. The wife did not surrender her rights under Massachusetts law, nor did our courts lose their authority with respect to the husband, merely because the parties attempted to preserve the marriage in Bahrain, then separated permanently when the marriage disintegrated. We are satisfied that both the long-arm statute and due process considerations permit the exercise by the Massachusetts court of jurisdiction over the person of the husband, and we accordingly turn to the other defenses.

2. *Res judicata.* As we have indicated, the judge concluded that both considerations of comity and principles of res judicata required dismissal of the wife's complaint. The grounds are obviously related. Should it be determined that a foreign judgment is not res judicata in whole or in part, the doctrine of comity would be inapplicable by definition to what has not been decided in the foreign tribunal. In other words, we owe no recognition to the foreign judgment if there is no judgment to recognize.

We pass for the time being the question whether the wife had adequate notice of the Bahrainian proceeding,[8] and examine both the judgment of that court and the judgment of the Turkish court to decide whether such judgments have preclusive effect. Neither judgment adjudicated any claim that the wife might have for alimony or allocation of marital assets. In this regard, the court in Bahrain, after ordering the husband to repay the wife's dowry, stated that the judgment was "without prejudice to

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for at least one year within the two years immediately preceding commencement of the action. See *Windsor v. Windsor*, 45 Mass. App. Ct. at 654 n.6.

[8] The wife received notice of the proceeding in Turkey, and participated in a limited way in the case.

the rights of the [wife] arising from the divorce, if any." The court in Turkey provided that "the Respondent's further right of claim for compensation of pecuniary loss and mental anguish is duly reserved." While each judgment contemplates the possible assertion of future claims by the wife, neither specifies whether such claims are to be pressed in the forum that rendered the judgment or instead can be asserted elsewhere.

Because the foreign tribunals did not adjudicate any economic entitlements that the wife might have,[9] we are not concerned with the possibility of issue preclusion, where an issue of fact "actually was litigated and determined in a prior action between the parties or their privies, and . . . the determination was essential to the decision in the prior action." *Heacock v. Heacock*, 402 Mass. 21, 25 (1988). Rather, the defense asserted is that of claim preclusion, which "makes a valid, final judgment conclusive on the parties and their privies, and bars further litigation of all matters that were or should have been adjudicated in the action." *Id.* at 23. The doctrine of claim preclusion ordinarily "bars not only relitigation of all matters decided in a prior proceeding but those that could have been litigated as well." *Gloucester Marine Rys. Corp. v. Charles Parisi, Inc.*, 36 Mass. App. Ct. 386, 391 (1994).

The present case presents the question whether these basic principles of claim preclusion have been altered in any way by that provision of G. L. c. 208, § 34, that authorizes a party to file a complaint for alimony or allocation of marital property "at any time after a divorce." The statute plainly contemplates that there has been a prior proceeding that dissolved the marriage. If the prior proceeding results in a valid judgment that provides for the division of the marital estate, that division, absent fraud, is not subject to

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[9] We are not persuaded by the husband's contention that the foreign tribunals did in fact address the wife's claims for economic relief and decided them by reserving them to some unspecified future time.

reopening in a subsequent proceeding. See *Bush v. Bush*, 402 Mass. 406, 409 (1988); *Kirtz v. Kirtz*, 12 Mass. App. Ct. 141, 145 (1981). Compare *Hartog v. Hartog*, 27 Mass. App. Ct. 124, 128-129 (1989) (modification in disposition of marital residence treated as change in child support).

Here, however, there has been no decision either by the Bahrainian court or by the Turkish court on any economic claims of the wife. That being the case, she is entitled to proceed under that provision of G. L. c. 208, § 34, that authorizes postdivorce relief. We have stated that" [b]efore res judicata will impose a limitation on the postdivorce dispositional power § 34 creates, the party seeking the limitation must prove that division of marital property was necessarily involved, litigated, and determined as part of the divorce proceedings themselves" (footnote omitted). *Bottiggi v. Wall*, 54 Mass. App. Ct. 430, 433 (2002). We recognize that this is a departure from the traditional application of the doctrine of claim preclusion whereby claims that could have been litigated in a prior proceeding, as well as those litigated and decided, are barred. See *Gloucester Marine Rys. Corp. v. Charles Parisi, Inc.*, 36 Mass. App. Ct. at 391. It is a departure that follows from the nature of divorce proceedings in general and the provisions of G. L. c. 208, § 34, in particular. If not previously litigated, a division of property subsequent to divorce is available under that section. See *Maze v. Mihalovich*, 7 Mass. App. Ct. 323, 326 (1979). Because economic issues are not necessarily involved in a judgment of divorce, such issues, where not actually tried and determined, remain open. See *Davidson v. Davidson*, 19 Mass. App. Ct. 364, 367 (1985).

Res judicata is an affirmative defense, see Mass.R.Civ.P. 8(c), 365 Mass. 750 (1974); *Bottiggi v. Wall*, 54 Mass. App. Ct. at 433 n.7, and the party asserting it has the burden of establishing the facts necessary to support it. The husband made limited showings regarding the proceedings in Bahrain and Turkey. The divorce judgments them-

selves demonstrate that the wife's claims for economic relief were not determined. Because the husband did not, and could not, overcome that, the defense based on res judicata fails.

3. *The doctrine of comity.* What we have said above on the subject of res judicata disposes of the proposition that considerations of comity preclude the court from entertaining the wife's present claims. With respect to the enforcement of a foreign judgment, "a court in Massachusetts must be satisfied that (1) the foreign court had jurisdiction over the parties and the subject matter, [and] (2) the procedural and substantive law applied by the foreign court was reasonably comparable to that of the Commonwealth." *Schiereck v. Schiereck*, 14 Mass. App. Ct. 378, 380 (1982).[10, 11] The husband made no showing, at least with respect to the Bahrainian divorce, that the court had jurisdiction of the person of the wife, nor did he demonstrate that either foreign tribunal applied law reasonably comparable to our own. Even had such showings been made, however, there was no way in which the husband could have overcome the uncontested fact that neither court adjudicated the wife's economic claims, thus leaving nothing on that subject that our courts would be obligated to recognize.

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[10] The *Schiereck* opinion identifies a third factor, i.e., that the foreign order be based on a determination of the best interests of the child, see 14 Mass. App. Ct. at 380, a factor that has no bearing in the present case.

[11] We note that the most recent draft of the American Law Institute's Proposed Foreign Judgments Recognition and Enforcement Act specifically excepts, and would not control recognition of, judgments in domestic relations matters. See *id.* at § 1(a)(i) (Tent. Draft No. 2, 2004). This, obviously, does not preclude Massachusetts from recognizing the judgment, assuming the required conditions are satisfied. See *Schiereck v. Schiereck, supra.*

4. *Disposition.* The judgment dismissing the wife's complaint is reversed. The case is remanded to the Probate and Family Court for further proceedings consistent with this opinion.

So ordered.

APPENDIX B

Supreme Judicial Court for the Commonwealth Of Massachusetts
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RE: Docket No. FAR-15056

FERIDE ELA AKINCI-UNAL
vs.
GOKHAN UNAL

Suffolk Probate & Family No. 97D2308
A.C. No. 2003-P-1629

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on 11/30/05, the above-captioned Application for Further Appellate Review was denied. (Cowin, J., recused)

Susan Mellen, Clerk

Dated: November 30, 2005

To: Linda A. Oullette, Esquire
Ailsa Deprada Deitemeyer, Esquire
Douglas S. Segal, Esquire

APPENDIX C

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss: PROBATE AND FAMILY COURT
NO. 97D-2308

FERIDE ELA AKINCI-UNAL,
Plaintiff,
vs.
GOKHAN UNAL,
Defendant

MEMORANDUM OF DECISION ON MOTION TO DISMISS

Statement of the Facts

The plaintiff Feride Ela Akinci-Unal, (hereinafter "wife") and the defendant Gokhan Unal, (hereinafter "husband") were married in a Muslim marriage ceremony in their homeland of Turkey on December 19, 1987. No children were born of the marriage.

The parties moved to Winthrop Massachusetts in 1988 for the husband to pursue his Masters in Business Administration at Suffolk University and a job opportunity with Massachusetts Financial Services, (hereinafter "MFS"). The wife learned English and worked full time at Filene's Department Store and Liberty Travel during the time that she lived in Massachusetts.

On February 1, 1988, the couple was married in a secular service in Winthrop, Massachusetts. In June of 1988, just a *few* months after the couple was married, the wife left alone for Turkey for 4-6 months.

In 1994, the husband, still an employee of MFS was assigned to the company's office in Manama, Bahrain and became a resident of Bahrain. He has lived and worked in Manama, Bahrain since that time. The couple lived to-

gether for a few weeks at a time over the next two years, due to the husband's business trips and the wife's visits with her family in Turkey. The wife stopped spending time in Bahrain in 1996. Spring of 1997 was the last time the wife went to Bahrain to see the husband.

The husband filed for divorce in Inskenderun, Republic of Turkey, 1st Law Court of First Instance, in July 1997. Shortly thereafter, the Wife filed an action for Separate Support in the Probate and Family Court, Suffolk Division on October 8, 1997. While the husband visited Massachusetts to meet with his employer, on January 14, 1998, he was served in hand with the Complaint for Separate Support.

Subsequently, the husband instituted a divorce action in Bahrain, in which the wife did not appear. On March 14, 1998, the Ministry of Justice of Islamic Affairs of the State of Bahrain granted the husband a divorce. On July 29, 1999, this Court, Gould, J. dismissed the wife's Complaint for Separate Support. Then, on June 1, 2000, the husband was granted a divorce under Turkish law, although compensation and maintenance rights of the wife were reserved in the divorce judgment. The wife was represented in the action for divorce filed in Turkey.

The wife filed a Complaint for Equitable Distribution. of Assets and Alimony Pursuant to G.L. c. 208, § 34 on September 22, 1999. The wife filed an Ex Parte Motion to Extend Time to Serve Summons and Complaint, dated December 28, 1999. This motion was denied by the Court, Rotman, J., on December 28, 1999. The wife filed another Motion to Extend Time to Serve on January 26, 2000, which was allowed by the Court, Gould, J. on January 27, 2000. The wife filed again, a Motion to Extend Time to Serve, dated, April 14, 2000, which was allowed by the Court, Gould J on April 18, 2000. On September 23, 2002, the wife filed for a Motion to Extend Time to Serve as well as for Alternative Service. The Court, Gould, J., allowed

the Motion to Extend Time to Serve, but denied the Motion for Alternative -Service on October 18, 2002. Finally, on November 6, 2002, the Court, Gould., J. allowed the wife's Motion for Alternative Service, which had been filed on July 16, 2002. The husband has since submitted a Motion to Dismiss, filed on March 7, 2003. The wife responded with an Opposition to the husband's Motion to Dismiss, filed on April 30, 2003. A hearing was held for the Motion to Dismiss on March 19, 2003 at the Probate and Family Court, Suffolk Division.

Doctrine of Comity

The doctrine of comity applies to the divorce decrees issued in Turkey and Bahrain and therefore, this cause of action should not be for the Courts of the Commonwealth. Comity is defined as the "self-imposed reluctance to interfere with courts of foreign countries." See generally, Canadian Filters (Harwich) Ltd. v. Lear-Siegler, Inc., 412 F.2d 577, 578 (151 Cir. 1969). The doctrine of comity counsels courts to "act only with care and great restraint" in order to avoid impinging on the jurisdiction and interests of that foreign court. Id. The applicable case law, relied upon by the husband, is in the area of custody, yet is comparable to the present case.

As stated in Karpigian v. DerMinassian, 212 Mass. 412, 414 (1912) the dissolution of the marriage in a foreign country "where the marriage was celebrated and where the parties are domiciled will be held a complete dissolution of the matrimonial contract in every other country." The criterion, established in Schiereck, to determine if comity should apply, are satisfied by the facts of the present case. 14 Mass. App. Ct. 378, 380 (1982) Under Schiereck, the foreign court must have had jurisdiction over the parties to the action and the subject matter. The Turkish and Bahrainian courts did have jurisdiction over the husband and wife, while the Courts of the Commonwealth do not. Also, the foreign court must apply procedural and substantive law

which is reasonably comparable to that of the Commonwealth, which is certainly true as to the divorces received by the husband and Wife in Bahrain and Turkey.[1]

In fact, all that is required under the interpretation of the criterion established in Schiereck is that the parties should have received a full and fair hearing and been afforded a full review on appeal. See, Custody of Minor, 392 Mass. 728 (1984).[2] As seen in Robbins v. Robbins, 343 Mass. 247 at 250, "a foreign judgment cannot be denied recognition solely because of an error of law or fact which does not affect the jurisdiction of the court rendering the judgment." See also, Fauntleroy v. Lum, 210 U.S. 230; American Exp. Co. v. Mullins, 212 U.S. 311; Roche v. McDonald, 275 U.S. 449; Titus v. Wallick, 306 U.S. 282.

Certainly, the wife was given a full and fair opportunity to a proper hearing in both Turkey and Bahrain. The wife chose not to appear in the Bahrainian proceedings and was represented in Turkey. The wife chose not to appeal either decision. Under the doctrine of comity, which is primarily a doctrine of fairness, the Turkish and Bahrainian courts, as courts with jurisdiction over the parties and the subject matter should be deferred to in the divorce judgment and in any further appeal or suit for matters yet to be decided, such as distribution of assets. The husband did not leave the Commonwealth, in order to avoid responsibility to the wife. In fact, he has been a resident of Bahrain for nine years now. The plaintiff has only lived in the Commonwealth for a short time. It may be true that the laws of the Commonwealth would be more favorable to the wife's claim. However, for the Commonwealth to decide the is-

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[1] A third criterion was .listed in Schiereck, which is applicable only to a custody decision, "The foreign order was based upon a determination of the best interests of the child." 14 Mass. App. Ct. at 380.

[2] Stating that "we might not enforce a foreign custody determination made in an arbitrary and capricious manner" Id. at 735.

sues presented would be a slap in the face to the Turkish and Bahrainian Courts and an intrusion into questions that should have been raised in the Courts where jurisdiction is appropriate.

Subject Matter Jurisdiction: Res Judicata

Res judicata applies to the issue of equitable distribution of property. Issues, which could have been raised in the original proceeding, are effectively waived and cannot be raised in an alternative forum. See, Heron v. Heron, 428 Mass 527 (1998); Sherrer v. Sherrer, 334 U.S. 343 (1948). The wife had every opportunity to raise a claim for distribution of assets in Turkey and in Bahrain. The wife chose not to raise such a claim and therefore, res judicata precludes this cause of action.

The husband relies upon Heron v. Heron, 428 Mass. at 538, 539, 540, where the wife was represented in the divorce proceeding and should have known about the property, had opportunity and incentive to raise the issue of property division in the Nevada action. Id. at 540. Not having raised the issue, she was now foreclosed from relitigating it in Massachusetts. Id. The circumstances in Heron are exactly the same as in the present case because the wife was represented in Turkey and had every opportunity and incentive to raise a claim for distribution of assets in the Turkish courts.

Clearly, the case of Sherrer v. Sherrer, 334 U.S. at 343, is applicable to the present case as well. In Sherrer, the court states, similarly, that "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own." As the court states in Sherrer, "We do not believe that dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister state on a decree valid in the state in which it was rendered." Id. at 343.

The wife's contention that the issues were not addressed in either foreign judgment must fail. The wife asserts that division of property was not addressed in either the Bahrainian or the Turkish decrees, and therefore, those particular issues are not res judicata. However, under Heron, where the wife presents the same argument that distribution of assets was not decided by the Nevada courts, The court states, "the divorce judgment is res judicata in the State of Nevada as to the division of marital property, just as it would be with any issue that was raised, or could have been raised, at that time. Thus we must give full faith and credit to the Nevada decree by denying this attempt to divide marital assets." 28 Mass. at 540. The same is true for the plaintiff's claim. Although the issue of division of assets was reserved in the decrees from Turkey and the adjudication was without prejudice to the wife in Bahrain, any return to the issue would be for those courts. The doctrine of res judicata precludes a second bite at the apple for litigants. To allow the wife a third bite at the apple would be an abuse of discretion.

Personal Jurisdiction

Even if the distribution of assets was not res judicata and subject to the doctrine of comity, the Courts of the Commonwealth do not have personal jurisdiction over the husband. The question of personal jurisdiction is "sensitive to the facts of each case," Good Hope Indus., Inc. v. Ryder Scott Co., 378 Mass. 1, 2 (1979). There is a two fold analysis which is used to determine whether a Massachusetts court has personal jurisdiction over a nonresident. Good Hope Industries, 378 Mass. at 5-6. The plaintiff who has the burden of proving the court's jurisdiction when challenged, Gray v. O'Brien, 777 F. 2d 864, 866 (1st Cir. 1985), must first establish sufficient facts which support personal jurisdiction under the long arm statute, M.G.L. c. 223, § 3 and then establish that the defendant has sufficient minimum contacts with Massachusetts to satisfy basic due

process mandated by the Constitution. International Shoe Co. v. State of Washington, 326 U.S. 310 (1945); Good Hope Industries, 378 Mass. at 5-6.

a. Long Arm Statute

M.G.L. § 3 c. 223A provides, in part: A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person's (a) transacting any business in this commonwealth. Although The term "transacting business" is broadly construed, and applies to any purposeful acts by an individual, whether personal, private, or commercial" See e.g., Bond Leather Co. v. O.T. Shoe Mfg. Co., 764 F. 2d 928, 931 (1st Cir. 1985); Ross v. Ross, 371 Mass. 439, 441 (1976), the wife's cause of action in no way arises out of the husband's business transactions.

There must be a rational nexus between the cause of action and the transaction of business in Massachusetts. See Johnson v. Witkowski, 30 Mass. App. Ct. 697, 573 (1971); GSI Lumonics, Inc. v. Biodiscovery, Inc., 112 F:Supp.2d 99 (D.Mass.2000) (applying Mass. law). The link between the husnand's contacts with the Commonwealth and the wife's cause of action is far too attenuated for the Commonwealth to have personal jurisdiction over the husband.

Although the wife claims that subsection (g) of the long arm statute should apply to provide that the Court has jurisdiction over the husband. M.G.L. c. 223A(g) § 3. This Section provides that a court may exercise jurisdiction over a person who is "maintaining a domicile in this Commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim..." The husband has not lived in the United States since 1994. Therefore, as in the case of Windsor v. Windsor, 45 Mass. App. Ct. 650, 654 (1998), the court stated that in order for subsection (g) to apply, the plaintiff must

prove that there was some sort of conduct by the defendant, such as cruel or abusive treatment, at the time that the two were domiciled in the Commonwealth. The wife, in the present case, has only alleged such treatment and has not proven, or attempted to prove, in any court of the Commonwealth that such treatment occurred

b. Minimum Contacts

As stated in Automatic Sprinkler Corp. of America v. Seneca Foods Corp., 361 Mass. 441, 443 (1972), since our long arm statute functions as "an assertion of jurisdiction over the person to the limits allowed by the Constitution of the United States," the long arm inquiry and the minimum contacts inquiry tend to converge. Id. The answer to both inquiries, (long arm statute and minimum contacts,) in order for the Commonwealth to have personal jurisdiction over a defendant, must be yes. See id. As stated above, the Commonwealth does not have personal jurisdiction over the husband under the long arm statute. Therefore, inquiry into whether or not the husband has minimum contacts with the Commonwealth is moot. Even still, the husband does not have sufficient minimum contact with the Commonwealth, and therefore it would offend traditional notions of fair play and substantial justice for the husband to be brought into the Court of the Commonwealth for this cause of action. International Shoe, 326 U.S. 310 (1945).

Under International Shoe, the contacts made by the defendant must be continuous, substantial, or systematic, in order for all claims, whether related to the defendant's contacts, that arise in that state, be brought against the defendant. Id. at 316. This is not true of the husband's contacts with the Commonwealth. The husband conducts business in the Commonwealth, but not in a continuous, substantial, or systematic way that would be necessary such that he could be held under the personal jurisdiction of the Commonwealth for a cause of action, which is so completely unrelated to that business. It would be unreasonable for the

husband to be brought into the Courts of the Commonwealth for a cause of action arising from a marriage that only touched the Commonwealth for a short time and which was dissolved in Turkey and Bahrain.

Conclusion

In conclusion, based on the foregoing, the defendant's MOTION TO DISMISS is hereby, allowed.

/s/
Nancy M. Gould, Justice

June 2, 2003

APPENDIX D

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

Suffolk, SS. APPEALS COURT
NO. 2003-P-1629

ELA FERIDE AKINCI-UNAL
Plaintiff/Appellee

v.

GOKHAN UNAL
Defendant/Appellant

On Appeal from a Judgment of
The Probate and Family Court,
Suffolk County

DEFENDANT/APPELLANT GOKHAN UNAL'S APPLICATION FOR FURTHER APPELLATE REVIEW

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* * *

It is well settled that a defendant over whom a State seeks to exercise personal jurisdiction must "have certain minimum contacts with [that State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (hereinafter, "International Shoe"), quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940). As the U.S. Supreme Court stated in Kulko v. Superior Court of California, 436 U.S. 84, 91 (1978) (hereinafter "Kulko"):

> The Due Process Clause of the Fourteenth Amendment operates as a limitation on the jurisdiction of the state courts to enter judgments affecting rights or interests of nonresident defendants...The existence of personal jurisdiction...depends on...a sufficient connection between the defendant and the forum State to make it far to require defense of the action in the forum.

In the instant case, Gokhan, like Mr. Kulko, contends "that his connection with the State of [Massachusetts] is too attenuated, under the standards implicit in the Due Process Clause of the Constitution, to justify imposing upon him the burden and inconvenience of defense in [Massachusetts]," and that the Appeals Court's "application of the minimum – contacts test in this case represents an unwarranted extension of International Shoe and would, if sustained, sanction a result that is neither fair, just, nor reasonable." Id. at 91-92.

Gokhan and Ela became residents of Bahrain in February, 1994 and April, 1994, respectively. (A. 64-65). Notwithstanding the marital difficulties the parties experienced during their stay in Massachusetts (A. 65, 83), it is uncontroverted that Ela joined Gokhan in Bahrain two months

after he moved there, and the final breakdown in the marital relationship occurred in Bahrain in 1996. (A. 66, 98). Ela filed her § 34 Complaint in September, 1999 (A. 3, 98), 5½ years after the parties moved to Bahrain, and she did not effect service of the § 34 Complaint until after her Motion for Alternative Service was allowed on November 6, 2002 (A. 4, 99), more than 8½ years after the parties moved to Bahrain. Given the remoteness in time of the parties' marital relationship in Massachusetts to the filing and service of Ela's § 34 Complaint, and the fact that Gokhan's only other contact with Massachusetts is that he works for a company with offices here (A. 64, 97), Gokhan contends that the facts of this case do not even come close to satisfying the "minimum contacts" standard mandated by International Shoe and its long line of progeny.

* * *

In Garrett v. Garrett, 668 So. 2d 991 (Fla. 1996) (hereinafter "Garrett"), the parties were married in Florida in 1974, had a daughter there in 1978, and moved to Texas in 1986, where they lived together until they separated in 1991. The wife returned to Florida in 1992, and the husband moved to Indiana. The wife filed for divorce in Florida 1994, after having dismissed a previously filed petition in Texas. The husband filed a motion to dismiss under Fla. Stat. Section 48.193, Florida's long-arm statute, on grounds of lack of personal jurisdiction. Id. at 992-993. Section 48.193(e) of the Florida long-arm statute differs from § 3(g) in that it confers personal jurisdiction on a defendant only if the parties are "maintaining a matrimonial domicile in this state at the time of the commencement of the action," but it also confers such personal jurisdiction if the defendant "resided in this state preceding the commencement of the action, whether cohabitating during that time or not." Garrett, supra, 668 So. 2d at 993.

In affirming the lower court's allowance of Mr. Garrett's motion to dismiss, the Florida Supreme Court ruled as follows:

> The language at issue – "if the defendant resided in this state preceding the commencement of the action" – cannot be taken quite so literally as to grant jurisdiction over any parties to a dissolution proceeding where the spouses had ever resided in Florida for any length of time...Here, the parties lived in Texas – as a married couple – for close to five years after leaving Florida. The wife did not return to Florida until after the parties separated. **To allow the court to obtain personal jurisdiction under these circumstances would empower the Florida courts to exercise jurisdiction over any party to a dissolution proceeding if the parties had ever lived in this state, for however brief a time. This would clearly violate the Due Process Clause of the United States Constitution.**

Id. at 994 (bold emphasis added). In Unal, the Appeals Court reaches exactly the opposite conclusion and result, in clear violation of the Due Process Clause of the U.S. Constitution. International Shoe, supra; Kulko, supra; and Good Hope, supra.

* * *

Further appellate review is clearly required to rectify the violation of Gokhan's Due Process rights under the U.S. Constitution that has resulted from the Appeals Court's failure to set reasonable time limits for the assertion of personal jurisdiction under § 3(g), and its unwarranted departure from the traditional application of the doctrine of claims preclusion.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify under the pains and penalties of perjury that on this 14th day of October, 2005, two copies of the within Application for Further Appellate Review were served upon Plaintiff/Appellee by hand-delivering same to her counsel of record, Linda A. Oullette, Esquire, Casner & Edwards, LLP, 303 Congress Street, Boston, MA 02210.

/s/_____

Supreme Court, U.S.
FILED
MAY 15 2006
OFFICE OF THE CLERK

No. 05-1099

IN THE

Supreme Court of the United States

GOKHAN UNCAL, PETITIONER

v.

FERIDE ELA AKINCI-UNAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS APPEALS COURT

BRIEF FOR RESPONDENT IN OPPOSITION

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INTRODUCTION

The Plaintiff/Respondent Ela Feride Akinci-Unal submits this Brief in Opposition to the Petition for a Writ of Certiorari filed by the Defendant/Petitioner Gorkhan Unal.

The Petitioner asserts that this Court should review the decision in this matter because the Massachusetts Appeals Court incorrectly held that the Probate and Family Court in Massachusetts had personal jurisdiction over the non-resident Petitioner to adjudicate alimony and property claims brought by the Respondent because the "heft" of the parties' marriage was located in Massachusetts. The Petitioner also claims that this matter raises an important federal question.

The Petitioner's claims fail on the merits, and rely in part, on an incomplete statement of the facts and procedural history as set forth by the Massachusetts Appeals Court. The Massachusetts Appeals Court properly determined that the Probate and Family Court in Massachusetts had personal jurisdiction over the Petitioner, both because the Massachusetts Long Arm Statute authorized the exercise of jurisdiction over him and because he had sufficient "minimum contacts" with the Commonwealth of Massachusetts to justify the exercise of such jurisdiction. In addition, this matter does not raise any important federal question warranting this Court's review. For these reasons, the Petitioner's Petition for Writ of Certiorari should be denied by this Court.

STATEMENT

This matter stems from a Massachusetts Appeals Court decision which held that the Suffolk Probate & Family Court in Massachusetts may properly assert personal jurisdiction over the Petitioner (who is no longer a resident of Massachusetts but who previously resided with the Respondent in Massachusetts during their marriage) with regard to property claims and alimony brought by the Respondent, not solely because the parties were married in Massachusetts and lived in Massachusetts, but because the "heft" of the marriage occurred in Massachusetts. The Petitioner's recitation of the facts and procedure as set forth by the Massachusetts Appeals Court is somewhat incomplete and therefore misrepresents the record as it was established by that Court.

In particular, the facts and procedural history as determined by the Massachusetts Appeals Court are as follows: The Petitioner and the Respondent were married in Turkey (their homeland) in a religious Muslim ceremony on December 19, 1987. Akinci-Unal v. Unal, 64 Mass. App. Ct. 212, 213 (2005).[1] No children were born of the marriage. (App. 2a). The parties moved to Massachusetts shortly after their marriage so that the Petitioner could attend business school and obtain a position in the financial services industry. (App. 2a-3a). On February 1, 1988, the parties were

[1] The Massachusetts Appeals Court's reported decision in Akinci-Unal is included as Appendix A to the Petitioner's Petition for Writ of Certiorari. Further reference to that Court's decision are hereinafter cited as "App.", followed by the relevant page number in the appendix.

once again married in a civil ceremony in Massachusetts. (App. 3a).

The parties lived together as husband and wife in Massachusetts for close to six years. Id. During this time, the Respondent left Massachusetts on four separate occasions to return to Turkey for extended periods. Id. Notwithstanding these absences, Massachusetts remained the status of the marital home during this six-year period. (App. 5a).

In late 1994, the Petitioner left Massachusetts by himself and took up permanent residence in Bahrain. (App. 3a). However, he remained employed by the same company that had employed him in Massachusetts. Id. The parties lived together in Bahrain sporadically over the next two years. Id. The Respondent left Bahrain permanently in October, 1996, but returned briefly in June, 1997 in order to collect her belongings. Id. Although the record from the lower court was somewhat in dispute regarding the precise details of the Respondent's domicile from 1996 forward, the parties agreed that the Respondent spent some time in Turkey but eventually returned to the United States, where she re-established her residency in Massachusetts. Id.

In July, 1997, the Petitioner commenced divorce proceedings in Turkey. Id. In October, 1997, the Respondent filed a Complaint for Separate Support in the Probate and Family Court in Massachusetts, effecting service of process on the Petitioner when he came to Massachusetts to meet with his employer. Id.

The Petitioner then initiated a second divorce action in Bahrain, where he obtained a judgment of divorce from the Bahrainian tribunal on March 14, 1998. Id. Although the Bahrainian judgment recites that the Respondent "was duly served by registered post", the Respondent asserted that she received no notice of the commencement of the Bahrainian divorce proceedings and she did not participate in those proceedings. Id. The Bahrainian judgment dissolved the marriage and ordered the Petitioner to repay the Respondent's dowry. Id. It further provided that the decision was "without prejudice to the rights of the [Respondent] arising from the divorce, if any". (App. 3a-4a) The Probate & Family Court in Massachusetts thereafter dismissed the Respondent's Complaint for Separate Support because the parties were no longer married. (App. 4a). The Respondent then filed a Complaint for Alimony and Equitable Distribution of Assets pursuant to M.G.L. chapter 208, Section 34, which Complaint was the subject of the appeal in the Massachusetts Appeals Court. Id.

The Petitioner ultimately went forward with the Turkish divorce proceedings. Id. The Respondent was represented by counsel in those proceedings. Id. On June 1, 2000, the Turkish court granted the Petitioner a divorce, but reserved any questions regarding the Respondent's rights to compensation or maintenance. Id. The Respondent obtained leave for alternative service on the Petitioner of her Complaint for Alimony and Equitable Distribution of Assets. Id. The Petitioner responded with a motion to dismiss, citing Mass. R. Civ.

P. 12(b)(1),(2),(4),(5) and (6).[2] Id. The motion was allowed after a hearing and the Respondent timely filed a Notice of Appeal. Id.

> The Massachusetts Appeals Court reversed the decision of the Probate and Family Court and held that the Respondent's claims against the Petitioner may go forward in that Court. (App. 12a). The Court properly noted that Massachusetts General Laws, chapter 208, Section 34, as amended, authorizes the award of alimony or the allocation of marital property "[u]pon divorce or upon a complaint in an action brought at any time after a divorce, whether such a divorce has been adjudged in this commonwealth or another jurisdiction ..., provided there is personal jurisdiction over both parties". (App. 4a). The Court then applied the two-step inquiry set forth in Good Hope Indus., Inc. v. Ryder Scott Co., 378 Mass. 1, 5-6 (1979) in determining whether the Probate and Family Court had personal jurisdiction over the Petitioner: that is, whether the assertion of jurisdiction over the nonresident defendant is authorized by statute and, if so, whether such "exercise of jurisdiction under State law [is] consistent with basic due process requirements mandated by the United States Constitution." (App. 5a).

---

[2] In addition to challenging personal jurisdiction, the Petitioner also argued that Respondent's action should be dismissed on grounds of comity and res judicata. (App. 8a-11a). Those arguments (which were also rejected by the Massachusetts Appeals Court) have not been raised in Petitioner's Petition for Writ of Certiorari.

The Massachusetts Appeals Court first concluded that jurisdiction over the Petitioner was authorized by the Massachusetts Long Arm Statute, M.G.L. chapter 223A, Section 3, as amended, which provides in pertinent part as follows: "A court may exercise personal jurisdiction over a person ... as to a cause of action in law or equity arising from the person's. . .(g) maintaining a domicile in this commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim." (App. 5a-6a). The Court noted that the parties married in Massachusetts and lived in the state from early 1988 to late 1994. (App. 5a). While noting that the Respondent was sometimes absent from the Commonwealth, the Court found that the marital home was nevertheless in Massachusetts during this period, thereby implicating the provisions of G.L. chapter 223A, Section 3(g). (App. 5a-6a). The Court further noted that the Petitioner "maintained a domicile in [Massachusetts] while a party to a personal or marital relationship" and that the Respondent's claims for alimony and property allocation have arisen out of the marital relationship. (App. 6a). The Massachusetts Appeals Court specifically rejected the Petitioner's contention that no claims exist because the parties had not lived in Massachusetts since 1994, noting that "[t]he claims for alimony and assignment of marital assets arise out of the existence of the marriage; while such claims may be triggered by the marriage's dissolution, the [Respondent's] rights are not a product of that dissolution, but rather of the preceding marital status". Id. The Court therefore concluded that jurisdiction

over the Petitioner was authorized pursuant to the Massachusetts Long Arm Statute.[3] (App. 6a-7a).

The Massachusetts Appeals Court then addressed the question of whether the Long Arm Statute, so applied, offends federal due process requirements. (App. 7a-8a). The Court properly noted that due process requires "that there be at least a minimum level of contact between the nonresident defendant and the forum State that reflects that the defendant has purposefully conducted activities within that State, 'thus invoking the benefits and protections of its laws.'" (App. 7a) quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958). The Court, in finding that such contacts existed, opined as follows:

> It is fair to say that the "heft" of the marriage was located here . . . . The [Petitioner] chose to come to Massachusetts, married here in a civil ceremony, and lived here in a marriage for close to six years. Having voluntarily engaged in a relationship that has legal consequences, the [Petitioner] can scarcely be surprised by, nor reasonably view as unfair, this State's enforcement of the [Respondent's] rights (if any) that arise from that relationship. Certainly, he does not defeat the Commonwealth's power to act merely by leaving the jurisdiction; such circumstances are among the reasons that long-arm statutes exist.

(App. 7a).

---

[3] The Petitioner does not challenge this finding of the Massachusetts Appeals Court in his Petition for Writ of Certiorari.

The Massachusetts Appeals Court specifically rejected a jurisdictional defense based on the fact that the parties lived in Bahrain between 1994 and 1996. Id. The Court noted that:

> The Commonwealth's power to adjudicate with respect to the [Petitioner's] obligations arose as the result of a marriage with a duration principally in Massachusetts. The [Respondent] did not surrender her rights under Massachusetts law, nor did our courts lose their authority with respect to the [Petitioner], merely because the parties attempted to preserve the marriage in Bahrain, then separated permanently when the marriage disintegrated.

(App. 7a-8a).

Following the issuance of the decision of the Massachusetts Appeals Court, the Petitioner filed an application for further appellate review in the Supreme Judicial Court. That application was denied without opinion. Akinci-Unal v. Unal, 445 Mass. 1106 (2005)(App. 13a).

REASONS FOR DENYING THE PETITION

As more fully set forth below, the Petitioner had sufficient "minimum contacts" with the Commonwealth of Massachusetts to warrant the exercise of personal jurisdiction over him. The Massachusetts Appeals Court correctly concluded that the "heft" of the Petitioner's marriage to the Respondent took place in Massachusetts and that having voluntarily engaged in a

relationship there that has legal consequences, there was no unfairness in requiring the Petitioner to adjudicate claims arising from that relationship in Massachusetts. The Petitioner's reliance on Kulko v. Superior Court of California , 436 U.S. 84 (1978) is misplaced, as the Petitioner's contacts with Massachusetts far exceeded the tenuous contacts which the defendant in Kulko had with the state of California. The decision of the Massachusetts Appeals Court in the instant case is consistent with cases from other jurisdictions which have approved the exercise of personal jurisdiction over a non-resident defendant under similar factual circumstances.

Also, as more fully discussed below, this case does not present a federal question warranting the issuance of a writ of certiorari. The mere fact that courts in other states have found that a non-resident defendant who previously lived in that state as part of a married couple and then left the jurisdiction did not have sufficient "minimum contacts" with the state in certain matrimonial cases does not create a federal question. The issue of personal jurisdiction is wholly dependent on the facts of each case and must therefore be decided on a case-by-case basis. The cases relied upon by the Petitioner are factually distinguishable from those in the case at bar.

I THE MASSACHUSETTS APPEALS COURT CORRECTLY HELD THAT THE PROBATE AND FAMILY COURT IN MASSACHUSETTS HAD PERSONAL JURISDICTION OVER THE PETITIONER.

The Petitioner first asserts that this Court should review the decision of the Massachusetts Appeals Court because that Court erred in finding that Petitioner had sufficient "minimum contacts" with the Commonwealth of Massachusetts. For the reasons stated below, the Petitioner's argument must fail.

Good Hope Indus., Inc. v. Ryder Scott Co., 378 Mass. 1 (1979) articulates the standard a Massachusetts court must utilize in determining whether there is personal jurisdiction over a non-resident defendant. There is a two-prong inquiry: (1) the assertion of jurisdiction must be authorized under the state's long-arm statute, and (2) the exercise of jurisdiction under state law must be consistent with basic due process requirements mandated by the United States Constitution. Id. at 5-6. The determination of personal jurisdiction over a non-resident is "sensitive to the facts of each case." Id. at 2.

In a series of cases, this Court has articulated the standards for determining whether the exercise of jurisdiction over a non-resident defendant satisfies the basic due process requirements of the United States Constitution. Thus, in International Shoe Co. v. Washington, 326 U.S. 310 (1945), this Court wrote that "in order to subject a defendant to a judgment *in personam*, if he be not present within the territory or

the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Id. at 316 quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940). Accord Burger King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1985) ("The constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum state"). If the defendant has performed some act "by which the defendant purposefully avails [himself] of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws," Hanson v. Denckla, 357 U.S. 235, 253 (1958), the forum state may, consistent with due process, exercise jurisdiction over a non-resident defendant. "Jurisdiction is proper. . .where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." Burger King Corp., supra at 475 quoting McGee v. International Life Insurance Co., 355 U.S. 220, 223 (1957). Even a single act can support the exercise of personal jurisdiction if it creates a "substantial connection" with the forum. McGee, supra at 223. See Asahi Metal Industry Co., Ltd. v. Superior Court of California, 480 U.S. 102, 109 (1987). An exercise of jurisdiction is warranted if "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980).

In his Petition, the Petitioner does not challenge the Massachusetts Appeals Court's finding that jurisdiction was proper under the Massachusetts Long Arm Statute. Rather, the Petitioner focuses on the

second prong of the aforementioned jurisdictional inquiry – the so-called "minimum contacts" inquiry – in supporting his request for review by this Court. In particular, the Petitioner relies on this Court's decision in Kulko v. Superior Court, 436 U.S. 84 (1978) in support of his argument. The Petitioner's reliance on Kulko, however, is entirely misplaced, as the facts of Kulko are entirely distinguishable from those of the case at bar.

In Kulko, this Court held that the California Superior Court could not exercise personal jurisdiction over the former husband of the plaintiff in an action to, among other things, increase the defendant's child-support obligations to her. Id. at 86. The Kulko defendant's contacts with the State of California (unlike those of the Petitioner with the Commonwealth of Massachusetts) were tenuous at best. Specifically, the Kulko defendant had been in California on only two occasions, once for a three-day military stopover years prior to the commencement of the subject litigation and a year later for a 24-hour stopover on his return from military service. Id. at 92-93. Although the couple had married in California during one of these two brief visits, the parties in Kulko spent their entire married life in New York. Id. at 93. The basis upon which the California court premised its exercise of personal jurisdiction over the defendant was his "actively and fully [consenting] to [the parties' daughter] living in California for the school year...and...[sending] her to California for that purpose" and the "financial benefit [the defendant] derived from his daughter's presence in California for nine months of the year". Id. at 94. The Kulko Court rejected these sparse connections with the State of California, noting that the defendant's actions

were not of the type "that a reasonable parent would expect to result in the substantial financial burden and personal strain of litigating a child-support suit in a forum 3,000 miles away" and opining that "we therefore see no basis on which it can be said that [the husband] could reasonably have anticipated being 'haled before a [California] court.'" Id. at 97-98 quoting Shaffer v. Heitner, 433 U.S. 186, 216 n.12 (1977).

The facts of the present case differ drastically from the facts Kulko--a point which the Petitioner implicitly concedes in his Petition. Unlike the defendant in Kulko, the Petitioner lived in Massachusetts with the Respondent for a significant time period: some six years and a period of time which the Appeals Court concluded was the principal duration of the marriage. Akinci-Unal, supra at 216-218 (App. 5a-8a). Unlike the plaintiff in Kulko, the Respondent in the instant case did not relocate to a jurisdiction with which she had not previously had significant contacts and which did not relate directly to her domestic relations issues.[4] Rather, she returned to the jurisdiction where the "heft" of the marriage had taken place. Id., at 217 (App. 7a). Whereas in Kulko, the claims at issue arose from a relationship which had taken place entirely in another jurisdiction, the claims at issue in the instant litigation arose where the parties had lived the majority of their married life together, in Massachusetts. The Petitioner's decision to live in Massachusetts with the Respondent for the bulk of the marriage clearly distinguish him from the defendant in Kulko, who had

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[4]In Kulko, the parties spent their entire married life in New York, not California. They drew up their separation agreement in New York, where it was signed by the plaintiff. Id. at 87.

done nothing that he could reasonably "expect to result in the substantial financial burden and personal strain of litigating a child. . .support suit in a forum 3,000 miles away." Kulko, supra at 97-98 quoting Shaffer v. Heitner, 433 U.S. at 216. As the Massachusetts Appeals Court properly noted in the case at bar:

> Having voluntarily engaged in a relationship that has legal consequences, the [Petitioner] can scarcely be surprised by, nor reasonably view as unfair, this State's enforcement of the [Respondent's] rights (if any) that arise from that relationship. Certainly, he does not defeat the Commonwealth's power to act merely by leaving the jurisdiction; such circumstances are among the reasons that long-arm statutes exist.

Akinci-Unal, supra at 217 (App. 7a).

The Petitioner's argument that "minimum contacts" might exist had the Respondent remained in Massachusetts after he left or if the parties owned property in Massachusetts at the time the Respondent commenced her action ignores the prior history of the parties' relationship with each other and their significant contacts with the Commonwealth of Massachusetts. It is clear that the couple had no contacts with any other state or country of the same magnitude that they had with Massachusetts. Contrary to what he implies in his Petition, it was entirely unreasonable for the Petitioner to conclude that either Bahrain or Turkey – where he ultimately instituted and concluded divorce proceedings – had greater contacts with the parties in this case, and that

the parties' economic claims would therefore be adjudicated in either of these jurisdictions.

Nor is the Petitioner's argument that it was Respondent's "unilateral activity" which subjected the Petitioner to jurisdiction in Massachusetts at all persuasive. The Petitioner's argument ignores the meaningful history of contacts between both parties and Massachusetts during the "heft" of the marriage which occurred there. This is not a case, as in Kulko, where the actions of the plaintiff alone established the contact with the forum state. Rather, it is the actions of both parties, in choosing to spend the majority of their marriage in Massachusetts, which subjected the Petitioner to jurisdiction in Massachusetts. See Burger King Corp., supra at 475; McGee, supra, at 223 (assertion of jurisdiction proper where contacts with the forum state result from actions of the defendant himself creating substantial connection with the forum state). Compare H. Lewis Packaging, LLC v. Spectrum Plastics, Inc., 296 F. Supp. 2d 234, 239-240 (D. Conn. 2003)(exercise of personal jurisdiction over non-resident defendant was appropriate; in rejecting the "unilateral act" dicta contained in Kulko, court found that the continuing course of conduct between the parties, including telephone calls, commission payments, and affiliation with the forum through business cards, in the aggregate suffices to provide defendant with fair warning that acts or omissions may require it to defend a lawsuit in the forum state); Mesalic v. Fiberfloat Corp., 897 F.2d 696, 701 (3rd Cir. 1990)(upholding jurisdiction over non-resident defendant where defendant's actions in the forum state, including mail and telephone communications and substantial repairs undertaken by defendant itself

"create[d] a substantial connection with the forum state")

The Massachusetts Appeals Court's decision is entirely consistent with the decision of at least two other courts that have held that personal jurisdiction is appropriate over a non-resident where monetary claims arise out of a marital relationship which previously existed in the forum state. Thus, in Steel v. United States, 813 F.2d 1545, 1551-1552 (9th Cir. 1987), the Ninth Circuit rejected a defendant's argument that Kulko prevented the exercise of personal jurisdiction over him in California in a declaratory action to require the federal government to honor a California judgment dividing the defendant's retirement benefits between the parties. There the Court stated:

> The claim next must be one that arises out of or results from the defendant's forum-related activities. As noted in another conflict of judgments case, "there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable." Estin v. Estin, 334 U.S. 541, 545, 92 L. Ed. 1561, 68 S. Ct. 1213 (1948). Unlike tort or contract cases, divorce and division of marital property will not always yield to a simple determination of what arises out of or results from forum-related activities. The shades here are fine indeed. Nevertheless, the problem regarding the division of the Steel's marital property is intimately bound up with Dean's contacts with California: his domicile there early in the marriage before moving with the Air Force, his return there from Italy, and his separation from

> his wife and children there. Dean contested the California court's jurisdiction over him in Helen's divorce action and lost. He did not appeal that determination. For the purposes of personal jurisdiction in a dispute over marital property, Dean's contacts are sufficiently related to the resulting conflict of judgments to support jurisdiction.

Id. at 1551.

Similarly, in Levy v. Levy, 185 A.D.2d 15 (N.Y. 1993), the Appellate Division of the Supreme Court of New York considered whether jurisdiction over a Washington resident was proper in a matrimonial case filed in New York by the plaintiff (a New York resident). In Levy, the parties were married in New York in 1970, had their first child there in 1973 and moved to Massachusetts in 1974 and then to Texas in 1976. Id. at 16. The couple later reestablished their marital domicile in New York in 1979, but relocated to California within a few years thereafter. Id. When the marriage disintegrated (in California), the plaintiff moved back to New York in 1982, and the defendant returned to New York in 1987 for a year before moving to New Jersey and later to Washington in 1989. Id. at 16-17.

The primary focus of the Court's inquiry in Levy was whether the lapse of time since the parties resided in New York precluded the exercise of jurisdiction under New York's long-arm statute.[5] However, the

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[5] In the instant case, the Massachusetts Appeals Court addressed a similar issue with regard to the Massachusetts Long Arm Statute.

Court went on to find that there were sufficient contacts between the defendant and New York to satisfy constitutional due process concerns, noting that "[d]efendant's contacts with New York were greater than the more attenuated contacts found in Kulko v. California Superior Court (436 U.S. 84)..." Levy, supra, at 18.

Both Steel and Levy stand for the proposition that a couple's prior residence in a forum state may create sufficient minimum contacts to warrant the exercise of personal jurisdiction over a non-resident defendant, even where that contact (by way of a martial relationship in the state) no longer exists and is arguably somewhat dated. They support the finding of Massachusetts Appeals Court in the present case and the Petitioner's argument that he lacked "minimum contacts" with Massachusetts should be rejected by this Court.

II. THERE IS NO FEDERAL QUESTION AT ISSUE IN THIS MATTER.

The Petitioner seeks to obtain the issuance of a writ of certiorari in this matter by simply alleging that states are in conflict over the application of the minimum contacts test under the due process clause.

The Court noted that a prior version of the statute had required that the marital domicile be in Massachusetts for at least one year within the two years immediately preceding commencement of the action. Akinci-Unal, supra, at 218 n.7 (App. 7a-8a). Noting that the statute had been amended to eliminate this time requirement, the Court concluded (as did the Court in Levy) that the marital residence in the forum state need not be recent. Id. at 217-218 (App. 7a).

The Petitioner's argument is wrong as a matter of law and should therefore be rejected by this Court.

As this Court has opined in Kulko:

> Like any standard that requires a determination of "reasonableness", the "minimum contacts" test of International Shoe is not susceptible of mechanical application; rather, the facts of each case must be weighed to determine whether the requisite "affiliating circumstances" are present. Hanson v. Denckla, 357 U.S. 235, 246 (1958). We recognize that this determination is one in which few answers will be written "in black and white. The greys are dominant and even among them the shades are innumerable." Estin v. Estin, 334 U.S. 541, 545 (1948).

Id. at 92. Thus, as the Massachusetts Appeals Court correctly noted, "[w]hether jurisdiction may be permissibly asserted under the long-arm statute is dependent on the particular facts of the case." Akinci-Unal, supra at 216 (App. 5a).

That other courts in other jurisdictions have reached a different conclusion regarding the propriety of asserting jurisdiction over a non-resident defendant than did the Massachusetts Appeals Court in the case at bar does not create a significant federal question warranting the issuance of a writ of certiorari. Rather, it simply illustrates that the facts of each particular case are unique, and that the court reviewing the issue of personal jurisdiction is free to weigh the particular facts in the case before it in determining whether the exercise of jurisdiction is appropriate under those

circumstances. Thus, the results of each of the three "conflicting" cases cited by the Petitioner are easily reconciled with the decision by the Massachusetts Appeals Court, because the facts of each of those cases differed from the facts in the instant case.[6]

Specifically, in Garrett v. Garrett, 668 So.2d 991 (Fla. 1996), the primary focus of the Court's decision was not the issue of whether "minimum contacts" existed, but rather whether the defendant-husband's prior residence in Florida subjected him to the so-called "prior residence" section of Florida's long arm statute. Id. at 992. The Court found that it did not. Nowhere in the Garrett Court's opinion does it state that exercise of jurisdiction based upon a prior residence in the forum state by a married couple some years earlier would violate the due process clause. Rather, the Court suggested only that empowering the Florida courts to exercise jurisdiction over a non-resident if the couple "ever lived in this state, for however brief a time" would violate the due process clause. Id. at 994. This is not the situation presented in the instance case, where the "heft" of the marriage took place in Massachusetts.[7]

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[6] The fourth so-called "conflicting" case cited by the Petitioner, Levy v. Levy, 185 A.D. 3d 15 (N.Y. 1993), which reaches the same result on the issue of personal jurisdiction as that reached by the Massachusetts Appeals Court in the instant case, is discussed supra at pages 17-18.

[7] Further, in Garrett, the couple had established a more significant relationship to the state of their subsequent marital domicile (Texas) than the parties in the instant case ever established in Bahrain or Turkey, where the Petitioner requested and obtained judgments of divorce.

Likewise, in Katz v. Katz, 707 A.2d 1353 (N.J. Super. 1998), the couple's joint residence in New Jersey (the forum state) existed some sixteen years prior to the commencement of the action in which the plaintiff sought to establish long-arm jurisdiction over the defendant. Id. at 1354-1355. Unlike the present case, the couple had jointly participated in divorce proceedings in Pennsylvania (the state to which they relocated after they lived in New Jersey) and executed a property settlement agreement there. Given the large lapse of time which had occurred since the defendant lived in new Jersey and the couple's decision to litigate their divorce elsewhere, the Katz court's decision that there was no personal jurisdiction over the defendant was warranted on the facts.

The case of Klette v. Klette, 167 A.D.2d 197 (N.Y. 1990) is similarly justified on its facts. As with the Garrett case discussed supra at 20-21, the primary thrust of the decision was that jurisdiction did not attach under New York's long arm statute, which the Court construed to require recent marital domicile in the state to confer jurisdiction (contrary to what the Massachusetts Appeals Court determined as to the Massachusetts long arm statute). However, even with respect to that part of the opinion which addressed the due process issue, the facts are distinguishable from both the instant case and the Levy case. As with Katz discussed supra at 21, the amount of time that had elapsed since the defendant lived in New York at the time the proceedings commenced and service was effected was far greater than the time that elapsed between when the Petitioner left Massachusetts and when the Respondent initiated the action that is at issue in the present case. Further, unlike the present

case, the principal duration of the marriage occurred in a jurisdiction other than the forum state. Similarly, as in Katz, the parties had agreed to litigate their divorce in the state to which the couple moved after they lived in New York (Connecticut) and they entered into a written separation agreement there. These facts are significantly different from the facts presented in the case at bar and the Klette court was warranted in reaching a different result on the issue of personal jurisdiction than did the Massachusetts Appeals Court.

Moreover, the Petitioner's reliance on the Uniform Interstate Family Support Act ("UIFSA") in support of his argument appears to be contradicted by at least one case. In Malwitz v. Parr, 99 P.3d 56 (Colo. 2004), the Supreme Court of Colorado (relying on its version of UIFSA) found that the exercise of jurisdiction was appropriate in a case where defendant's contacts with the State of Colorado were limited to abusing and harassing the plaintiff in Texas to a point where she and the parties' child were forced to relocate to Colorado from Texas. The Malwitz Court wrote:

> In assessing a defendant's contacts, we consider whether the "defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." World-Wide Volkswagen, 444 U.S. at 297. In some circumstances, even a single act may subject a defendant to jurisdiction, where that act creates a substantial connection between the defendant and the forum state.

Id. at 61. Certainly the Petitioner's contacts with Massachusetts were far more extensive than the contacts of the defendant in Malwitz. Yet, in the particular facts of that case, jurisdiction was nevertheless appropriately conferred, given the enormous consequences in the forum state which the defendant's actions created. Malwitz is yet another example of the case-by-case analysis required when evaluating the due process component of a claim for personal jurisdiction over a non-resident defendant. That the results may vary from case to case is wholly consistent with federal law and does not create a federal question warranting the issuance of a writ of certiorari.

CONCLUSION

For the reasons set forth above, the Respondent respectfully requests that the Petition for a Writ of Certiorari filed by Petitioner be denied.

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(3)

No. 05-1099

IN THE

Supreme Court of the United States

OCTOBER TERM, 2005

GOKHAN UNAL

Petitioner,

v.

FERIDE ELA AKINCI-UNAL

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MASSACHUSETTS APPEALS COURT

PETITIONER'S REPLY MEMORANDUM

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In her opposition, respondent makes three demonstrably futile points. First, she asserts that petitioner's statement of the facts is "somewhat incomplete" [Opp. at 2]. She fails, however, to point to any facts which have been omitted. The record is clear. The parties left Massachusetts while still married and took up residence in Bahrain. There, the marriage fell apart and respondent returned to her family in her homeland of Turkey. More than two years after departing Massachusetts as petitioner's wife, she returned to Massachusetts when petitioner filed a divorce proceeding in Turkey. No shades of gray color the stark issue presented by the Appeals Court's ruling, *viz.*, whether the "minimum contacts" test of the Due Process Clause is satis-

fied merely because the parties once lived in Massachusetts before jointly abandoning the state.[1]

Second, and ironically, a case relied on by respondent actually demonstrates why Massachusetts cannot permissibly exercise jurisdiction over her property claims against petitioner under the Due Process Clause.

Respondent cites *Steel v. United States*, 813 F.2d 1545 (9th Cir. 1987) for the principle that "personal jurisdiction is appropriate over a non-resident where monetary claims arise out of a marital relationship which previously existed in the forum state" [Opp. at 16]. She misstates the holding. *Steel* held that a California court had personal jurisdiction of a divorce judgment and subsequent claim to military retirement pay against. The court's ruling was expressly premised on the very facts which do not exist here - the parties' separation occurred in California, where the ex-wife then remained, and the marital property was located there. *Id.* at 1549-52. As the *Steel* court observed, the ex-wife's claim arose "out of the marriage *and separation that led to*" the conflicting divorce judgments; "[a]ll of the family's *ties and property* are within California"; and the assertion of jurisdiction by a California court was therefore constitutional precisely because "the problem regarding the division of [the couple's] marital property is intimately bound up with [the ex-husband's] contacts with California", including the marital domicile "and his separation from his wife and children there." *Id.* [emphasis added]. *Steel*'s formulation follows this Court's suggestion that a constitutional measure of personal jurisdiction should recognize that property claims "arise[] from a separation" and that a court therefore should look to where the separation

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[1] The Massachusetts location of petitioner's employer [Opp. at 3] is constitutionally insufficient for jurisdiction of his "personal, domestic relations". *See Kulko v. Superior Court of California*, 436 U.S. 84, 97 (1978); *Katz v. Katz*, 310 N.J.Super. 25, 27-32, 707 A.2d 1353, 1354-56 (A.D. 1998).

"occurred" rather than merely to where the "marital relationship" once was located. *Kulko v. Superior Court of California*, 436 U.S. 84, 97 (1978). Here, of course, the separation did not occur until after the parties jointly abandoned Massachusetts. Accordingly, *Steel* undermines respondent's argument.

Finally, respondent minimizes disagreement among the state courts about the application of the "minimum contacts" test. In particular, she dismisses the ruling in *Garrett v. Garrett*, 668 So.2d 991 (Fla. 1996) [Opp. at 20]. But the *Garrett* court stated unequivocally that the Due Process Clause would be violated were a Florida court to assert jurisdiction where the couple left Florida while married, where they therefore "effectively abandoned" Florida, and where the wife "did not return to Florida until after the parties separated". *Id.* at 994. Under the Appeals Court's "heft" standard, however, and under respondent's "magnitude of contacts" version [Opp. at 14], the *Garrett* court would have to find the requisite "minimum contacts" because the parties while married had lived in Florida for more than twice the duration of their subsequent domicile in Texas. *Id.* at 992. In short, *Garrett* cannot be reconciled with the Appeals Court's misapplication of the Due Process Clause.

Respondent also tries to distinguish the Comment to the Uniform Interstate Family Support Act which indicates that the Appeals Court's ruling is wrong. *See* 9 U.L.A. 186, 186-87 (2001) [Pet. at 16-17]. Respondent cites a Colorado case under that state's version of the uniform law which held that the defendant's "purposeful abuse and harassment" of his wife in Texas, "forcing [her] to Colorado" where he "knew that [her] sole family ties" were located, satisfied the "minimum contacts" test. *In re Marriage of Malwitz*, 99 P.3d 56, 63 (Colo. 2004) [Opp. at 22]. *Malwitz*, however, in no way "contradict[s]" the Comment cited by petitioner [Opp. at 22]. Instead, the Comment addresses the

very different circumstance presented here, where the parties voluntarily and jointly abandon the state and one returns after a period of years to rekindle jurisdiction. 9 U.L.A. at 186-87.[2]

The constitutional posture of this case is unchanged. The Appeals Court's ruling distorts due process analysis in a way which supports blatant forum-shopping. That ruling therefore conflicts with the Due Process Clause in circumstances which require decision by this Court, including the importance of this recurring question and the evident disagreement among the state courts.

Respectfully submitted,

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May 22, 2006

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[2] Of course, had this case involved child support and the abuse and harassment alleged in *Malwitz*, the place to which respondent *foreseeably* would have fled is Turkey, not Massachusetts. *In re Marriage of Malwitz*, 99 P.3d at 63 [Pet. at 3a n. 1, 15a]. That is in fact where she voluntarily removed from Bahrain and where petitioner filed a divorce action [Pet. at 3a n. 1].It should be noted that even as to the different context in *Malwitz*, the court's ruling was the subject of a dissenting opinion joined in by three justices. *Id.* at 64-66.